SUBSIDIARITY IN PRIVATE LAW?

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A. INTRODUCTION

As in law generally,[1] clarity, certainty, and predictability are important to private law.[2] By extension, there is value in an improved understanding of how different private law rules, regimes, and institutions interrelate.[3] The utility of subsidiarity to the pursuit of this aim has not been explored by anglophone private lawyers. To date, the only substantial discussion of subsidiarity in anglophone private law scholarship has taken place in the realm of unjust enrichment.[4] Even then, this material is relatively thin; and outwith that particular context, lawyers are yet to debate more broadly about, say, the meaning of subsidiarity *in private law*.[5] By contrast, subsidiarity's basic meaning and function have been extensively analysed in English outside the private law sphere. And in France, a small but significant *general* discourse about subsidiarity from a private law perspective does exist. The French literature shows that subsidiarity in private law need not, by any means, be confined to the context of unjust enrichment.[6] Subsidiarity could one day transcend the unjust enrichment setting in *anglophone* private law discourse, too.

This state of affairs prompts the attempt in this paper to stir debate by offering six propositions about what it might mean to designate a rule or relationship (between legal regimes, say) as one of subsidiarity.[7] The object is pre-emptively to provide some first and – necessarily – non-exhaustive general thoughts about subsidiarity, suitable for evaluating its worth to private law, in which it might be used to understand legal rules, or the interaction of different kinds of claim.

Given the lack of material on which to build in English, and which is specific to private law, this paper casts a wide net for consensus. Its six propositions are formulated by reference, principally,

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1 Lord Bingham, *The Rule of Law* (2010) ch 3.

2 See, eg, *Revenue and Customs Commissioners v Investment Trust Companies* [2017] UKSC 29, [2018] AC 275 paras 38, 41.

3 Lord Rodger wrote that such things are often overlooked in general, giving examples from private law to support his view: A Rodger, "'Say Not the Struggle Naught Availeth': The Costs and Benefits of Mixed Legal Systems" (2003) 78 Tul LR 419 at 425.

4 Publications about this more specific topic based on my doctoral research, "The Subsidiarity of Unjust Enrichment: Anglo-Franco-Scots Perspectives" (PhD Thesis, Edinburgh, 2019), are in preparation. Detailed discussion is avoided here.

5 This is not to say that private lawyers have not thought about subsidiarity *at all*. See, eg, P Zumbansen, "Happy Spells? Constructing and Deconstructing a Private-Law Perspective on Subsidiarity" (2016) 79(2) Law & Contemp Probs 24, pondering the contribution of private law thinking to subsidiarity elsewhere, namely, in global governance and transnational regulation.

6 The sources are cited *ambulando*, except for one contribution, which, though notable, and which supports the point just made in the main text, is too concrete to be of more general *abstract* assistance: C David, "Le principe de subsidiarité: droits privé et fiscal français et droit communautaire" in A Lévi (ed), *Droit et vie des affaires: Études à la mémoire d'Alain Sayag* (1997) 205.

7 Whilst these propositions are supported by the sources cited below, space precludes a more detailed account of subsidiarity in general, about which divergent views are legitimately held across different fields. On some of these see, eg, A Føllesdal, "Competing Conceptions of Subsidiarity" (2014) 55 Nomos 214. For a detailed historico-etymological study, which cannot be pursued here, see A Joyeux's monumental "Le principe de subsidiarité, entre terminologie et discours: pistes pour une nouvelle histoire de la formule" (PhD Thesis (in two vols), Franche-Comté, 2016).

to thinking about subsidiarity in other contexts; and, secondarily, to (i) miscellaneous literature about subsidiarity, (ii) the general French private law literature about subsidiarity, and (iii) what abstract points can be gleaned from relevant unjust enrichment discourse.[8] The state of play in that discourse is summarised, before the choice of Roman Catholic social teaching, European Union law, and European human rights law as settings to examine for their conceptions of subsidiarity is explained, and subsidiarity in each of these contexts is sketched out. Succeeding sections then outline each proposition, and clarify how it may be derived from the sources. The paper concludes by reflecting on the potential of subsidiarity in private law, as a way to model the interrelation of private law claims and doctrines.

B. SUBSIDIARITY IN UNJUST ENRICHMENT

Sources endorsing the subsidiarity of unjust enrichment commonly agree that it involves the conditional constraint of enrichment claims as subsidiary to others.[9] Several variations on this theme exist.[10] These are canvassed to provide clarity during later discussion, before some more general observations.

Sometimes, subsidiarity entails that enrichment claims are barred *in the presence* of another claim or legal institution, ie, where another route to redress *is* available at the same time as an enrichment claim.[11] This first kind of rule is supported in South Africa, for example, where the eventual recognition of a general enrichment action has been embraced, but on the basis that it could only be invoked if established enrichment actions (such as the *condictiones*) would not avail a plaintiff.[12] So, too, in Scotland. In *Transco Plc v Glasgow City Council*,[13] the pursuer performed the defender's obligation to keep up a bridge, and an enrichment claim in respect of the expense saved was barred, because a statutory action for the performance of the defender's statutory duty was available.[14]

Subsidiarity may also entail that enrichment claims are barred *in the absence* of another claim or legal institution, ie, where another route to redress is itself barred, and an enrichment claim might otherwise arise, or where another legal regime expressly or impliedly excludes the operation of unjust enrichment. This second kind of rule has been endorsed in Scots law. In *Courtney's Executors v Campbell*,[15] an enrichment claim by a cohabitant's estate against the deceased's former partner was barred because, at the material time, the one year time limit on a statutory action for financial redress following cohabitation breakdown had expired.[16]

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[8] For reasons of space, and to avoid imputing propositions to authors who may not assent to them, only more developed literature is cited, to the exclusion of shorter, intuitive observations, such as W Swain's brief explanation of a case as having held that a "non-contractual action was subsidiary to the action in contract", though no such language appears in the judgment: *The Law of Contract 1670-1870* (2015) 136; discussing *Cutter v Powell* (1795) 6 Term Rep 320; 101 ER 573.

[9] Including, potentially, different kinds of enrichment claim: R Evans-Jones, *Unjustified Enrichment, II: Enrichment Acquired in Any Other Manner* (2013) paras 3.09-3.10, 3.37-3.39.

[10] Detailed discussion of relevant law and scholarship in England, France, and Scotland (with some reference to other jurisdictions, such as Australia) may be found in Campbell (n 4) chs 3-9.

[11] Whether a claim must be practically or theoretically available, and against whom, are questions which legal systems do not always answer: HL MacQueen, *Unjustified Enrichment*, 3rd edn (2013) 54.

[12] *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA) at 487-489, arguing for "a general action which will fill the gaps" between and around South Africa's established enrichment actions, and noting historical support for a general action, "at least one of a subsidiary nature"; D Visser, "The Potential Role of a General Enrichment Action" (2009) 20 Stellenbosch LR 454 at 456-458; J du Plessis, *The South African Law of Unjustified Enrichment* (2012) 6-10; J C Sonnekus, *Unjustified Enrichment in South African Law*, 2nd edn (JE Rhoodie tr, 2017) 50-51.

[13] *Transco Plc v Glasgow City Council* [2005] CSOH 76, 2005 SLT 958.

[14] Court of Session Act 1988, s 45.

[15] *Courtney's Executors v Campbell* [2016] CSOH 136, 2017 SCLR 387.

[16] Family Law (Scotland) Act 2006, s 28(8).

Other legal systems endorse both kinds of rule, as does France,[17] in the *Code civil's* article 1303-3, which provides: "The impoverished person has no action on this basis [ie, in *enrichissement injustifié*] where another action is open to him or is barred by an obstacle of law, such as prescription." So, where a delictual action is available on a given set of facts,[18] or where its conditions cannot be established (an obstacle of law),[19] an action in *enrichissement injustifié* will be barred on those facts. The position is a little more complex, however. French courts do not rigidly apply their version of the second kind of rule identified here.[20] There is also a third rule of subsidiarity,[21] that where an action other than one based on *enrichissement injustifié* is practically useless due to an obstacle of fact,[22] then an enrichment action will be allowed. The standard example of this is where A's contractual claim against B is useless because of B's insolvency, which fact will open the way to an enrichment action against C, where C has been unjustifiably enriched by A's contractual performance.[23] This rule is not confined to cases in which B is contractually obliged to A;[24] it can also apply in two party cases;[25] and obstacles of fact other than insolvency have been recognised by the courts.[26]

To diversity among systems which explicitly endorse the vocabulary of subsidiarity to explain unjust enrichment's interactions with other areas of law must be added different approaches to the use of the language by common law scholars. Some have imposed the vocabulary of subsidiarity on judicial decisions from which it is absent,[27] or where it appears only in a judge's

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[17] For general commentary on the institution of *quasi-contrat* in France, and, specifically, the action in *enrichissement injustifié*, see F Terré and others, with F Chénedé, *Droit civil: Les obligations*, 12th edn (2018) paras 1261-1330 esp 1299-1318.

[18] CA Paris, 22 December 2017, RG nº 14/19086.

[19] CA Agen, 9 May 2018, RG nº 16/00044 (the action failed for want of fault by the defendant).

[20] The rule is seemingly not applied in informal contexts, as where a contract of ad hoc partnership cannot be proved: Civ 1re, 4 May 2017, pourvoi nº 16-15563, *Bull civ* I, nº 103; [2017] JCP G 790, noted by Y Dagorne-Labbe; [2017] D 1591, noted by A Gouëzel. The classic counterexample here is the consistent denial of enrichment actions in the presence of unproved contracts of loan, to which particular rules of proof apply: Civ 1re, 2 April 2009, pourvoi nº 08-10742, *Bull civ* I, nº 74; [2009] Defrénois 1285, observations by E Savaux; [2009] RTD Civ 321, observations by B Fages. On proof of loans, see the *Code civil*, art 1359; Civ 1re, 19 June 2008, pourvoi nº 07-13912, *Bull civ* I, nº 176. For ad hoc partnership, provable by any means, see the *Code civil*, arts 1832, 1873; Com, 13 March 1984, pourvoi nº 82-11866, *Bull civ* IV, nº 99.

[21] The continued existence of which is confirmed by an *a contrario* reading of the *Code civil*, art 1303-3: O Deshayes, T Genicon and Y-M Laithier, *Réforme du droit des contrats, du régime général et de la preuve des obligations – Commentaire article par article*, 2nd edn (2018) 634.

[22] The terminology dates to at least the 1940s in the French cases. See, eg, CA Orléans, 5 January 1949; [1949] S, II, 64. There, the court distinguished an "*obstacle juridique*" from a "*simple obstacle de fait*" by reference to the "*caractère subsidiaire*" of the *action de in rem verso*, and its status as a "*voie subsidiaire*".

[23] Req, 11 September 1940; [1940] Gaz Pal, II, 114; [1941] S, I, 121, noted by P Esmein.

[24] The relevant obligation may be statutory: Civ 1re, 1 February 1984, pourvoi nº 82-15496, *Bull civ* I, nº 45; [1984] D 388, noted by J Massip; [1984] RTD Civ 712, observations by J Mestre.

[25] As where B cannot be sued in one manner at first, but later returns to a financial position which makes it worthwhile for A to sue B in *enrichissement injustifié*: Civ 1re, 3 May 2007, pourvoi nº 05-19454; [2007] RTD Civ 765, observations by J Hauser.

[26] CA Nîmes, 13 September 2012, RG nº 09/02741: absence from jurisdiction of B, so C, in the jurisdiction, could be sued instead; CA Riom, 13 mars 2017, RG nº 15/02796: B's lack of known domicile meant than C could be sued instead; Civ 1re, 3 May 2007 (n 25): B"s absence and destitution.

[27] See, eg, R Havelock, "Anticipated Contracts That Do Not Materialise" [2011] RLR 72 at 73 and note 18; R Havelock, "A Taxonomic Approach to Quantum Meruit" (2016) 132 LQR 470 at 473-474 and notes 33-34; citing, for the view that unjust enrichment is subsidiary to the law of contract, *Pan Ocean Shipping Co Ltd v Creditcorp Ltd (The Trident Beauty)* [1994] 1 WLR 161 (HL) at 164. There, Lord Goff referred to the contractual regime between Trident and Pan Ocean, rendering a restitutionary remedy against Creditcorp (Trident's assignee of a right to hire) "both unnecessary and inappropriate"; his Lordship also referred, at 166, to the fact that a claim in restitution would have been "unjust", since Creditcorp had purchased, as assignee, a right to payment from Trident (the assignor). None of this explicitly suggests a subsidiarity analysis, but others still have cited the decision as endorsing the subsidiarity of unjust enrichment to the law of contract. See, eg, R Grantham and C Rickett, "Property Rights as a Legally Significant Event" [2003] CLJ 717 at 741-744 and notes 112, 118. Another decision said to support the subsidiarity of unjust enrichment

footnotes.[28] Others, by contrast, have avoided this practice.[29] Thus, a cautious survey in 2002 noted that unjust enrichment in the common law "does not know 'subsidiarity' by that name, but elements of that relationship appear to be embedded in the law".[30] Common law judges have not yet decided whether subsidiarity is indeed relevant to unjust enrichment, as some commentators consider.

The above patchwork cannot be criticised in itself: it is axiomatic that difference is not necessarily a bad thing. It does, however, spark interest in the possibility of clarifying our understanding of subsidiarity before it migrates to other private law contexts. This paper seeks to identify consensus for the future. In this regard, the divergent unjust enrichment sources are of limited use. But reference can still be made below to points at which unjust enrichment discourse aligns with material from the other contexts under consideration. As well as supporting the propositions put forward, this may give an idea of the maturity of anglophone discourse about subsidiarity in unjust enrichment, seemingly the only private law arena in which it has been addressed at any length. From the unjust enrichment sources, we can also surmise that the potential use of subsidiarity to private lawyers in general is in understanding legal rules, and in modelling relations between different kinds of claim, doctrine, or legal institution.[31]

C. SELECTING AND SUMMARISING SUBSIDIARITIES IN THE WORLD ELSEWHERE

To avoid repetition below, basic features of subsidiarity in Roman Catholic social doctrine, European Union Law, and European human rights law, are outlined here, after three preliminary points. First, these contexts are the maximum manageable in the space available, taking account of other material cited. Catholic teaching has been selected because, whilst such luminaries as Aristotle, Aquinas, and Althusius, are generally regarded as earlier mediators of thought about subsidiarity, the Church has long made "deliberate efforts to systematise" it.[32] European Union law and European human rights law are included because their conceptions of subsidiarity have been the subject of much analysis, and, at least for the purposes of this paper, appear well settled.[33]

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to the law of contract, but which does not contain the vocabulary, is *Benedetti v Sawiris* [2013] UKSC 50, [2014] AC 938; referred to by R Havelock, "The Valuation of Enrichment in the Supreme Court" [2013] RLR 97 at 101 and notes 207-212 (footnoting in the case notes section of this journal is continuous).

[28] In the title of an article cited in second place, behind a source which was selected for full quotation in a judgment itself: *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68, (2001) 208 CLR 516 para 75 and notes 113-114 (Gummow J); citing, in order, J Dietrich, *Restitution: A New Perspective* (1998) 29-35; R Grantham and C Rickett, "On the Subsidiarity of Unjust Enrichment" (2001) 117 LQR 273 at 289-293; then quoting from D Laycock, "The Scope and Significance of Restitution" (1989) 67 Texas LR 1277 at 1278. Gummow J's dictum is taken to endorse subsidiarity by, eg, R Grantham, "Restitutionary Recovery *Ex Æquo Et Bono*" [2002] Sing JLS 388 at 397-398.

[29] G Jones (ed), *Goff & Jones: The Law of Restitution*, 7th edn (2007) para 1-062 and note 78; C Mitchell, P Mitchell and S Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment*, 9th edn (2016) para 2-04.

[30] L Smith, "Property, Subsidiarity and Unjust Enrichment" in D Johnston and R Zimmermann (eds), *Unjustified enrichment: key issues in comparative perspective* (2002) 588 at 623.

[31] See, eg, HL MacQueen, "Unjustified Enrichment, Subsidiarity and Contract" in V Palmer and E Reid (eds), *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (2009) 322 at 329: subsidiarity involves "questions of the relationship between unjustified enrichment and other parts of the law".

[32] K Endo, "The Principle of Subsidiarity: From Johannes Althusius to Jacques Delors" (1994) 44 Hokkaido LR 652 at 632-629, 627 (page numbers inverted in original). See also N Aroney, "Subsidiarity in the Writings of Aristotle and Aquinas" in M Evans and A Zimmermann (eds), *Global Perspectives on Subsidiarity* (2014) 9; R F Johnson, "The Political Uses of Subsidiarity: From Thomas Aquinas to Thomas Courchene" (PhD Thesis, Western Ontario, 2000) chs 2-4.

[33] In this regard, we might distinguish, for example, South Africa's "principle of constitutional subsidiarity", which holds "that where legislation is enacted to give effect to a constitutional right, a litigant may not bypass the legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard": *de Lange v Presiding Bishop of the Methodist Church of Southern Africa* [2015] ZACC 35, 2016 (2) SA 1 para 53, and the authorities cited. This conception of subsidiarity is not discussed here, because it is still developing: *Pretorius v Transport Pension Fund* [2018] ZACC 10, 2019 (2) SA 37 para 52.

Secondly, one omission should be explained. The idea of a subsidiary entity in corporate law does not assist the present analysis. Taking the current United Kingdom companies legislation as an example, we may juxtapose subsidiary and holding companies, and subsidiary and parent undertakings.[34] But the general meaning of subsidiarity merely implies assistance or supplement. It does not carry with it the idea of *control* of a subsidiary entity by a non-subsidiary one, which inheres in the corporate law usage. This usage therefore stands out as a "special" one, according to the *Oxford English Dictionary*.[35] As such, it is best overlooked in this discussion, which seeks to build from generally accepted notions, rather than exceptions to orthodoxy. This choice perhaps derives further support from the fact that the equivalent commercial entity in French law is simply called a *société contrôlée*.[36]

Thirdly, it is helpful to illustrate from a neutral context a consistent theme in what follows: subsidiarity is fundamentally about the allocation of competence or authority among entities, or groups of entities, *on a conditional basis*.[37] This appears from the following observation by a majority of the Supreme Court of Canada. Subsidiarity is:[38]

> [T]he proposition that law-making and implementation *are often* best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity […]; there is a fine line between laws that legitimately complement each other and those that invade another government's protected legislative sphere.

Several scholars agree that subsidiarity is characterised by the operation of a "rebuttable presumption" as to where competence or authority lies.[39] Conditionality is borne in mind throughout our discussion, as it goes to the essence of subsidiarity.[40]

(1) Roman Catholic subsidiarity

In *Centesimus Annus*, John Paul II summarised Roman Catholic subsidiarity as follows:[41]

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[34] Companies Act 2006 (UK), ss 1159, 1162. See also, eg, Australa's Corporations Act 2001 (Cth), s 46.

[35] "Subsidiarity, n." <https://www.oed.com/view/Entry/193007> accessed 20 May 2019; "Subsidiary, Adj. and n." <https://www.oed.com/view/Entry/193008> accessed 20 May 2019 esp sense 1. B. 1., and special uses. (The *Oxford English Dictionary* has "moved online" for its third edition, and there is no up to date print copy: "OED Editions" < https://public.oed.com/history/oed-editions/> accessed 20 May 2019.)

[36] *Code de commerce*, arts L-233-3, L-233-4.

[37] It may be simplistic to think of relationships of subsidiarity as involving a straightforward hierarchy among entities. Since there is no consensus on the point below surface-level, no commitment is made here. See M Cahill, "Theorizing Subsidiarity: Towards an Ontology-Sensitive Approach" (2017) 15 Int J Const L 201.

[38] *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)* [2001] SCC 40, [2001] 2 SCR 241 para 3, emphasis added. The judgment was given in English. Conditionality appears from the official parallel French translation in the form of suitability, *or not*, to perform a given action (emphasis added): "Ce principe [de subsidiarité] veut que le niveau de gouvernement le mieux placé pour adopter et mettre en œuvre des législations *soit celui qui est le plus apte à le faire*, non seulement sur le plan de l'efficacité mais également parce qu'il est le plus proche des citoyens touchés et, par conséquent, le plus sensible à leurs besoins, aux particularités locales et à la diversité de la population."

[39] T Horsley, "Space to Breathe: Subsidiarity, the Court of Justice and EU Free Movement Law" (PhD Thesis, Edinburgh, 2011) 12-13, 29, 58; J Contesse, "Contestation and Deference in the Inter-American Human Rights System" (2016) 79(2) Law & Contemp Probs 123 at 125; A Føllesdal, "Subsidiarity and International Human-Rights Courts: Respecting Self-Governance and Protecting Human Rights – or Neither?" (2016) 79(2) Law & Contemp Probs 147 at 148-149; J Finnis, "Subsidiarity's Roots and History: Some Observations" (2016) 61 Am J Juris 133 at 134 (subsidiarity is "presumptive and defeasible"); N Aroney, "Federalism and Subsidiarity: Principles and Processes in the Reform of the Australian Federation" (2016) 44 Fed LR 1 at 4 (word rebuttable not used); M Cahill, "Theorizing Subsidiarity: A Rejoinder to Gareth Davies" (2017) 15 Int J Const L 231 at 232.

[40] T Latimer, "Against Subsidiarity" (2018) 26 J Pol Phil 282 at 282-283.

[41] *Encyclical Letter Centesimus Annus* (1991) para 48 (original emphasis). See further M Evans, "The Principle of Subsidiarity as a Social and Political Principle in Catholic Social Teaching" (2013) 3 Solidarity 44; P Brennan,

> *[T]he principle of subsidiarity must be respected*: a community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to coordinate its activity with the activities of the rest of society, always with a view to the common good.

This principle concerns the allocation of authority to act to the *best* level of society, with a conditional presumption in favour of smaller associations – the smallest one(s) *capable* of performing a given action.[42] An accessible example is the Church's endorsement of families" helping other families, with careful state intervention when "families cannot fulfil their responsibilities".[43] One can also instance economic regulation, stimulation and support by the state in times of crisis, for the benefit of the economy's users.[44]

(2) Subsidiarity in European Union Law

Subsidiarity is also a principle of the European Union's legal order. So far as relevant, article 5 of the Treaty on European Union ("TEU") provides:[45]

> 3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.
>
> The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

Here, the default presumption favours competence in the Member States. The Union may act in cases of shared competence,[46] on condition that this be more effective than action by Member States.[47] Union action is reviewable on subsidiarity grounds before the Court of Justice of the European Union ("CJEU").[48] A notable example of a reviewed initiative is legislation at Union level, aimed at regulating the market for tobacco products and improving public health by reducing tobacco usage, through restrictions on the ingredients of tobacco products and their external

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"Subsidiarity in the Tradition of Catholic Social Doctrine" in M Evans and A Zimmermann (eds), *Global Perspectives on Subsidiarity* (2014) 29.

[42] John XXIII, *Encyclical Letter Mater et Magistra* (1961) paras 52-53.

[43] *Catechism of the Catholic Church*, 2nd rev edn (US Conference of Catholic Bishops tr, 1997) §§2208-2209.

[44] *Compendium of the Social Doctrine of the Church* (Pontifical Council for Justice and Peace 2004) §§351-355.

[45] Consolidated Version of the Treaty on European Union [2016] OJ C202/1. From a large literature, see, eg, P Craig, "Subsidiarity: A Political and Legal Analysis" (2012) 50 JCMS 72; G A Moens and J Trone, "The Principle of Subsidiarity in EU Judicial and Legislative Practice: Panacea or Placebo?" (2015) 41 J Legislation 65. For a situation of subsidiarity within the wider context of competence and authority in the EU, see R Schütze, "EU Competences: Existence and Exercise" in D Chalmers and A Arnull (eds), *The Oxford Handbook of European Union Law* (2015) 75.

[46] And not of the EU's exclusive competence: Case C-491/01 *British American Tobacco Investments and Imperial Tobacco (Approximation of laws)* EU:C:2002:741, [2002] ECR I-11453 para 179.

[47] Case T-122/15 *Landeskreditbank Baden-Württemberg – Förderbank v European Central Bank* EU:T:2017:337, [2018] 1 CMLR 7 para 65.

[48] Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality [2016] OJ C202/206 para 8; Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 art 263; Case C-508/13 *Estonia v Parliament and Council* EU:C:2015:403 paras 41-55.

packaging. This initiative was unsuccessfully challenged by tobacco companies on the ground that the matter was one for Member States alone.[49]

(3) Subsidiarity in European human rights law

Strasbourg's "principle of subsidiarity captures a norm of power distribution between" the European Court of Human Rights ("ECtHR") and the states party to the Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR" / "the Convention").[50] The ECtHR has held that "[s]ubsidiarity is at the very basis of the Convention, stemming as it does from a joint reading of [its] Articles 1 and 19".[51] These provisions, which confirm that both contracting parties and the ECtHR are bound by the ECHR framework, respectively state:

> The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.
>
> To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights […]. It shall function on a permanent basis.

One manifestation of subsidiarity within the ECHR framework is highlighted by the following observation of the ECtHR:[52]

> By virtue of Article 1 of the Convention, the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights. This subsidiary character is articulated in Article 13 and Article 35 § 1 of the Convention.

These provisions state:

> Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.
>
> The Court may only deal with [a] matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

The ECtHR has discussed these provisions many times.[53] Whilst the default position is that ECHR violations will be dealt with domestically, the ECtHR may examine a complaint on condition that

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[49] Case C-547/14 *Philip Morris Brands v Secretary of State for Health* EU:C:2016:325, [2017] QB 327 paras 186, 213-228.
[50] *Altan v Turkey* App no 13237/17 (ECtHR, 20 March 2018) para 2 of the concurring opinion (joined in by a majority).
[51] *Austin v United Kingdom* (2012) 55 EHRR 14 para 61. See also *A v United Kingdom* [2009] ECHR 301, (2009) 49 EHRR 29 paras 154, 174. See generally F Sudre (ed), *Le principe de subsidiarité au sens de la Convention européenne des droits de l''homme* (2014); A Mowbray, "Subsidiarity and the European Convention on Human Rights" (2015) 15 HRLR 313. For a situation of subsidiarity in human rights law as a whole, see G L Neuman, "Subsidiarity" in D Shelton (ed), *The Oxford Handbook of International Human Rights Law* (2013) 360.
[52] *De Souza Ribiero v France* (2014) 59 EHRR 10 para 77. See N Bamforth, "Articles 13 and 35(1), Subsidiarity, and the Effective Protection of European Convention Rights in National Law" (2016) 5 EHRLR 501.
[53] See, eg, *McFarlane v Ireland* (2011) 52 EHRR 20 paras 107-108, 112; *Ananyev v Russia* (2012) 55 EHRR 18 paras 93-99; *Chiragov v Armenia* (2016) 63 EHRR 9 paras 115-116; *Ninos v Greece (French text)* App no 28453/10 (ECtHR, 7 June 2018) paras 33-34.

there be no effective domestic remedies or where these have been exhausted. For example, the ECtHR has proceeded to examine alleged Convention violations in relation to inhumane prison conditions, even when legal recourse was in theory available from the contracting state, because domestic remedies were not sufficiently available in practice.[54]

D. FIRST PROPOSITION: ASSUMED EXISTENCE OF ENTITIES

Once in place as an operative rule or principle, subsidiarity is not concerned to determine whether a given entity to which it applies actually exists. This is straightforwardly assumed by a rule of subsidiarity. If, instead of simply conferring on a set of entities subsidiary and non-subsidiary statuses, a rule "disappeared" one or more of those entities, it would be difficult to argue that the rule was one of subsidiarity. To be a rule of subsidiarity, a rule should create, maintain, or put an end to, a relationship of subsidiarity between entities. A rule which destroys one or more of the entities the interaction of which it is supposed to manage might be thought not to discharge any of these functions in relation to that entity. It would also seem to deal with a question of overlap (discussed in section F of this paper) in a less then conditional manner, an approach opposed to the essence of subsidiarity. Once an entity does not exist, there is no way for it eventually to become competent, even if a subsidiarity analysis suggests that it should. These intuitions are borne out in the contexts under consideration.

Catholic social doctrine supports our first proposition. Its principle of subsidiarity presumes the existence all the while of the individuals, groups, and associations which subsidiarity regulates. One concern of the common good is "the overall welfare of society and the development of *a variety of intermediate groups*, applying the principle of subsidiarity".[55] "Subsidiarity is first and foremost a form of assistance to the human person via the autonomy of intermediate bodies":[56]

> It is not, therefore, a question of whether there shall be group persons, or whether they are efficient or immediately useful to the state. Rather, the question is how these groups stand to one another and to the state.[57]

Support is also found in subsidiarity in European Union law. Article 5(3) TEU cannot be applied so as to dissolve the Union. It would be strange if a provision which said nothing about that could undo a treaty and put an end to a legal person – the Union – created "for an unlimited period",[58] to say nothing of all the Member States. Other material suggests that subsidiarity is not about wiping them from the face of the map, either.[59]

A like impression is gleaned from European Human rights law. The ECtHR "function[s] on a permanent basis".[60] And "under the subsidiarity principle it falls first to the national authorities to redress any alleged violation of the Convention".[61] It seems implausible for a principle which has

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[54] *Varga v Hungary* (2015) 61 EHRR 30 paras 44-65.
[55] Francis, *Encyclical Letter Laudato Si"* (2015) para 157 (emphasis added). On the common good, see further John XIII, *Encyclical Letter Pacem in Terris* (1963) paras 53-79; *Catechism of the Catholic Church* (n 43) §§1905-1912.
[56] Benedict XVI, *Encyclical Letter Caritas in Veritate* (2009) para 57.
[57] R Hittinger, "The Coherence of the Four Basic Principles of Catholic Social Doctrine: An Interpretation" in M Archer and P Donati (eds), *Pursuing the Common Good: How Solidarity and Subsidiarity Can Work Together* (2008) 75 at 109.
[58] TEU arts 47, 53.
[59] See, eg, the preamble to the Charter of Fundamental Rights of the European Union [2012] OJ C326/391: "This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States […]".
[60] Convention for the Protection of Human Rights and Fundamental Freedoms, art 19.
[61] *Mikhno v Ukraine* App no 32514/12 (ECtHR, 1 September 2016) para 116.

the aim of delegating to contracting states responsibility for protecting Convention rights simultaneously to be concerned with deciding upon the existence of those states. Articles 13 and 35(1) of the Convention, set out above, say nothing about doing that at all.

In his monograph on subsidiarity in private law, Antoine Gouëzel recognises the proposition set out in this section.[62] It is also borne out by the analysis of Lionel Smith in the unjust enrichment context. He defines subsidiarity as either "a relationship between claims" or "a relationship between legal dispositions or sets of rules".[63]

As an *idea*, subsidiarity may *provide arguments* for any number of actions, like preserving the existence of some agents,[64] or their pre-existing internal power structures.[65] It can justify the centralisation of power in some scenarios where this is appropriate, or even the creation of new agents with authority, for example, to represent local concerns in the face of overcentralisation.[66] However, these matters are simply expressions of subsidiarity's more general preoccupation, and what seems to be its overriding, master function as an operative rule: to allocate competence or authority on a conditional basis.[67] It is unconcerned with whether the entities to which authority might be allocated exist.

E. SECOND PROPOSITION: PLURALITY OF ENTITIES

A relationship of subsidiarity positively requires the existence of at least two entities, or groups of entities. This is a relatively short point. Most scholars tacitly assume its correctness,[68] though some are explicit about it.[69] Without a plurality of entities, no relationship – whether a relationship of subsidiarity or not – would be possible in a given context, and whatever authority or competence existed in that context would lie unconditionally with the only relevantly extant entity. The Roman Catholic Church teaches that:[70]

> Subsidiarity respects personal dignity by recognizing in the person a subject who is always capable of giving something to others. […] It is able to take account both of the manifold articulation of plans – *and therefore of the plurality of subjects* – as well as the coordination of those plans.

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[62] A Gouëzel, *La subsidiarité en droit privé* (Economica 2013) para 319.
[63] Smith (n 30) at 597.
[64] M Cahill, "Sovereignty, Liberalism and the Intelligibility of Attraction to Subsidiarity" (2016) 61 Am J Juris 109 at 120-122.
[65] G A Bermann, "Taking Subsidiarity Seriously: Federalism in the European Community and the United States" (1994) 94 Columbia LR 331 at 342-343.
[66] N W Barber, "The Limited Modesty of Subsidiarity" (2005) 11 Eur LJ 308 at 314, 319-320.
[67] M Jachtenfuchs and N Krisch, "Subsidiarity in Global Governance" (2016) 79(2) Law & Contemp Probs 1 at 9-10: "Subsidiarity is typically understood primarily as a principle for allocating powers to different levels of governance, yet it may also provide guidance on how powers are to be exercised. For example, subsidiarity can be thought to include an element of proportionality that requires powers to be exercised in a way that is not more intrusive for lower levels than alternative ways to achieve the same aim. […] [H]owever, as a default rule for the distribution of decision-making powers, subsidiarity is primarily an allocative principle".
[68] See, eg, P S Berman, "Jurisgenerative Constitutionalism: Procedural Principles for Managing Global Legal Pluralism" (2013) 20 Indiana J Global LS 665 at 670, 688-690; T Endicott, "Comity among Authorities" [2015] CLP 1 at 8-11, 20-21.
[69] T Horsley, "Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?" (2012) 50 JCMS 267 at 268: "subsidiarity is premised on the existence of at least two autonomous decision-making bodies, unified through the pursuit of a common objective".
[70] Benedict XVI (n 56) para 57 (emphasis added).

Hittinger says:[71]

> As a principle regulating and coordinating a plurality of group-persons, subsidiarity presupposes a plurality of such persons, each having distinct common ends, kinds of united action, and modes of authority. […] Take away social plurality and there is nothing that can correspond to the principle of subsidiarity.

This seems difficult to disagree with. If the Member States of the European Union did not exist as a group, then there would be nothing *to which* the Union could be subsidiary. If the Union did not exist, then even if the Member States were "non-subsidiary" in relation to other things, they could not be "non-subsidiary" in relation to the Union. These points also hold true for relations between the states party to the ECHR, and the ECtHR. French private law scholars agree: more than one entity is required for subsidiarity to be relevant in a given context.[72] And in the unjust enrichment context, a well-known definition of subsidiarity explicitly states that "[s]ubsidiarity describes [a] relationship between *two* claims or doctrines".[73]

F. THIRD PROPOSITION: POTENTIAL FOR OVERLAP

For a rule of subsidiarity to be relevant in any context, at least two entities in that context must be capable of overlapping if unrestrained. This goes to the central purpose of subsidiarity. Without some potential for overlap in the actions of a plurality of entities, in the sense that the subject(s) of their action is (or are) the same, there is nothing for a conditional rule of subsidiarity to do. Of the "principle of subsidiary function",[74] the Catholic Encyclical *Quadragesimo Anno* states:[75]

> Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do.

Catholic social doctrine therefore assumes that subsidiarity is about resolving overlap in the activities of which individuals and associations of different sizes are each capable. Were this not true, a principle like that set out in *Centesimus Annus*, above (in section C(1)), would serve no purpose.

In the European Union context, it seems clear as a matter of fact that there are things which both Union and Member States are capable of doing. Indeed, their relations are also premised upon their both being able, at least to some extent, to "assist each other in carrying out tasks which flow from the Treaties".[76]

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[71] Hittinger (n 57) at 109, 119. See further J Chaplin, "Subsidiarity and Social Pluralism" in M Evans and A Zimmermann (eds), *Global Perspectives on Subsidiarity* (2014).

[72] J Raynard, "A propos de la subsidiarité en droit privé" in C Atias and others (eds), *Mélanges [à la mémoire de] Christian Mouly* (1998) 131 at 132, 136; P Casson, "Le subsidiaire et le droit privé" [2001] RRJ 143 at 153; Gouëzel (n 62) paras 36, 47; C Habre, *La subsidiarité en droit privé* (2015) para 122 (tacitly); S Fucini, *La priorité en droit privé* (2019) paras 119, 121.

[73] Grantham and Rickett, "Subsidiarity" (n 28) at 273; explicitly approved by J Beatson and E J H Schrage (eds), *Cases, Materials and Text on Unjustified Enrichment* (2003) 424; and presupposed by Havelock, "Taxonomic Approach" (n 27) at 475-477, making use of Grantham and Rickett"s study. See also, implicitly, R Evans-Jones, *Unjustified Enrichment, I: Enrichment by Deliberate Conferral: Condictio* (2003) para 1.99; N Whitty, "*Transco Plc v Glasgow City Council*: Developing Enrichment Law after *Shilliday*" (2006) 10 Edin LR 113 at 126.

[74] Pius XI, *Encyclical Letter Quadragesimo Anno* (1931) para 80.

[75] ibid, para 79.

[76] TEU, art 4(3).

We see the same assumption in European Human rights law. Articles 1 and 19 of the ECHR oblige both contracting states and the ECtHR to secure the Convention rights of those over whom the latter have jurisdiction. Subsidiarity establishes default competence in the contracting states, and the case law of the ECtHR elaborates on when this position shifts. It would not need to do this unless both contracting states and the ECtHR could enforce Convention rights. And if that were not possible, there would be no need for subsidiarity, "a fundamental feature of the machinery of protection established by the Convention".[77]

The French writers on subsidiarity in private law agree on this point:[78] the potential for overlap between norms of concurrent application is the *raison d'être* of subsidiarity. Philippe Casson usefully suggests that, in private law, we might think about overlap in terms of whether sets of norms can be invoked on the same set of facts,[79] and the same view can be discerned in the work of noted enrichment scholar, Hector MacQueen.[80] As writers on unjust enrichment also confirm, overlapping norms may, at least in theory, amount to claims against the same person, or *different* people.[81]

G. FOURTH PROPOSITION: META-AUTHORITY

For a rule of subsidiarity definitively to resolve questions of allocation and overlap, it must bind the relevant entities by constituting an independent, higher authority in relation to them. If this were not so, and the relevant entities could manage their relations without an independent, higher, organising rule (as, for example, would be the case if one of them were sovereign and could dictate any relevant interactions), there would be no need for subsidiarity. This may be called the "subsidiarity as meta-authority" point.[82] By this, it is meant that a rule of subsidiarity is what dictates whether the entities to which it applies have competence or authority, however they might behave if unrestrained.[83] And the condition, howsoever formulated, on which allocation takes place, goes to the general essence of subsidiarity. These points are borne out in the contexts under examination.

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[77] *MC and AC v Romania* App no 12060/12 (ECtHR, 12 April 2016) para 57.

[78] Gouëzel treats this at some length: (n 62) paras 43-46. See also Habre (n 72) para 1193; Raynard (n 72) at 134; Fucini (n 72) paras 120-122. One French author disputes that this is the only function of subsidiarity in its managing the relationship between obligations. But her analysis still commits her to the proposition that, at a higher level of generality than her account, constraints upon a plurality of entities in a subsidiarity regime are what prevent their overlapping: C Aubry de Maromont, "Les obligations subsidiaires" [2018] RTD Civ 305.

[79] Casson (n 72) at 151. This seems to be what Niall Whitty had in mind when he produced the first in-depth study of the potential subsidiarity of unjustified enrichment in Scots law: Whitty (n 73) at 131, referring to a lack of overlap between grounds of action for vindicatory and enrichment remedies, making it impossible for unjust enrichment actions to be subsidiary to vindicatory ones.

[80] MacQueen (n 31) at 331.

[81] See, eg, Whitty (n 73) at 127; D Visser, *Unjustified Enrichment* (2008) 56-57.

[82] For the "meta" terminology, see, eg, D Burbidge, "The Inherently Political Nature of Subsidiarity" (2017) 62 Am J Juris 143, *passim*, eg, at 162: "the principle of subsidiarity is on the one hand used to explain how perceived lower groups should not have their decision-making authority usurped unnecessarily and, on the other hand, is used as a meta-explanation for how authority is distributed within a constitutional order". The search for adequate meta-authority to mediate the overlap of various layers of entities can prove endless and fruitless: S Banner, "Please Don't Read the Title" (1989) 50 Ohio St LJ 243 at 250, 253-254. The issue of eventual self-reference by a given authority in order to claim legitimacy may be relevant in some contexts. But it seems unproblematic when considering the relationship between claims or doctrines sourced in law which is at least one step below any apex (perhaps constitutional) rules in a hierarchy of norms, because there will always then be at least one higher plane from which a relevant rule of subsidiarity can operate on a set of claims or doctrines.

[83] It is conceded that the entities to which a rule of subsidiarity applies may engage with the framing of the premise on which the rule operates, as in a political process between provinces and a federation. For the argument that they should, see Burbidge (n 82).

Roman Catholic social doctrine sees subsidiarity as a "universal authority", which, in the eyes of its framer, the Church, governs conditions within states, and across the world between states.[84] More generally, Catholic social doctrine, of which subsidiarity is part, emanates from the Church. The latter considers itself independent of society, especially the state, and capable of intervening authoritatively in social affairs, in particular those of the state.[85] So the Church is a meta-authority in relation to the individuals and social associations, the interaction of which it seeks to manage with its meta-rule of subsidiarity.

In the European Union, member states and the Union are bound by the treaties and European Union law in general.[86] In particular, the principle of subsidiarity binds the Union.[87] European Union subsidiarity thus sits higher than, and separately from, the entities the interaction of which it manages.

Under the ECHR, the relevant function of contracting states and the ECtHR – securing convention rights – is not framed as optional in nature by articles 1 and 19 of the Convention. A constant line of cases affirms both the subsidiarity of the ECtHR to the member states in fulfilling their central objective, and how important this arrangement is.[88] The principle also features in a Protocol no 15 amending the Convention, which is not yet in force.[89] Once it is fully ratified, subsidiarity will be present in the Convention as a matter of language, not just interpretation. Even now, however, subsidiarity seems secure in practice. It is unlikely that either a disgruntled contracting state, or the ECtHR, could reverse their respective positions in the relationship of subsidiarity without amending the Convention. Rather, it would probably require a fully negotiated protocol or other Convention amendment. After all, this is what was thought necessary for Protocol 15, which was addressed at several conferences, and requires unanimous assent.[90]

To date, the argument in this section seems not to have been made explicitly. Some do, however, appear to recognise that, when operating as a rule or principle of allocation, as opposed to a simple political or philosophical idea,[91] subsidiarity needs to bind the entities to which it applies. This is clear, for example, when writers ask questions like: "[w]hat does subsidiarity require?"[92] The French subsidiarity scholarship is inexplicit on this point. But it is possible to draw on work about the interaction in France of the *droit commun* with the *droit spécial* (or *droits spéciaux*), ie, general law and special legal regimes. Anglophone lawyers will be familiar with this dichotomy through the Latin maxim *specialia generalibus derogant*.[93] Some authors affirm that the *droit commun* is *subsidiary* to

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[84] John XIII (n 55) paras 140-141.

[85] Pius XI, *Encyclical Letter Ubi Arcano Dei Consilio* (1922) para 65; Paul VI, *Encyclical Letter Gaudium et Spes* (1965) para 76.

[86] For the Union, see, eg, TFEU art 263. For Member states, see Case 6/64 *Costa v Ente Nazionale per l'Energia Elettrica (ENEL)* [1964] ECR 585 at 593.

[87] Case T-263/07 *Estonia v Commission* EU:T:2009:351 para 52: subsidiarity "binds the Community institutions in the exercise of their legislative functions". The point was expressed differently on appeal: Case C-505/09 P *Commission v Estonia* EU:C:2012:179 para 81.

[88] In addition to the passages already set out above, see *Vučković v Serbia* (2014) 59 EHRR 19 para 69; *Bahmanzadeh v United Kingdom* (2016) 63 EHRR SE2 para 46; *Gherghina v Romania* (2015) 61 EHRR SE15 para 83.

[89] Protocol No 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms art 1: "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention."

[90] ibid, preamble and arts 6-7.

[91] Subsidiarity's operation as an idea is addressed briefly in section C of this paper. But its allocative function is the more usually discussed. See the passages quoted above from Jachtenfuchs and Krisch (n 67) at 9-10.

[92] N W Barber and R Ekins, "Situating Subsidiarity" (2016) 61 Am J Juris 5 at 8.

[93] On which, see H Roland and L Boyer, *Adages du droit français*, 4th edn (1999) §418. The maxim obviously conceals much complexity; the literature cited in this paragraph should be consulted for detail.

the *droits spéciaux*.[94] But this is only possible because that state of affairs is *caused*, and relations between the two categories of laws are regulated, *by something*.[95] If, as is claimed, that something creates a relationship of subsidiarity between the *droit commun* and *droits spéciaux*, then it must possess *authority* in relation to the categories the interaction of which it controls,[96] and so be independent of them. There could be no relationship of subsidiarity if this something were just an element of one of the categories in the relationship. That would just make for a relationship involving the sovereignty of one entity (or entities), and the subjection of another (or others), depending on one's point of view. A group of entities capable of organising their own relations in this way does not need subsidiarity. In French law, there seems to exist an independent norm, potentially *sans texte*, according to which the *droit commun* applies in default of the *droits spéciaux*.[97] The norm also features in some legislation. One can instance article 1105 (formerly article 1107) of the *Code civil*,[98] which assures the default application of general rules of contract law.[99] Its independence from the general and special rules is clear by its placement in the first chapter of the relevant title of the relevant book of the Code civil, headed "Preliminary provisions" (*dispositions liminaires*). The maxim *specialia generalibus derogant* in French law, which can be conceived in terms of subsidiarity, is a meta-authority in relation to the general and special rules to which it applies.

For those discussing the subsidiarity of unjust enrichment, and thinking about the expansion of subsidiarity into other realms of private law, there is much food for thought here. In academic writing, it is not always clear what is thought to be the source of the subsidiarity of unjust enrichment.[100] Those who have considered the point have suggested that subsidiarity is a characteristic inherent in unjust enrichment.[101] But it has also been argued that, at least when it comes to enrichment-contract relations, the primacy of contract is what assures enrichment's subsidiarity instead.[102] On either of these views, and if there is any merit in the idea of subsidiarity as meta-authority, subsidiarity might not be needed by unjust enrichment lawyers. Why introduce a tertium quid to complicate matters if, say, unjust enrichment and contract can manage their interrelationship without it? This idea will also be relevant when private lawyers consider what subsidiarity can contribute outside the unjust enrichment context.

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[94] C Goldie-Genicon, *Contribution à l"étude des rapports entre le droit commun et le droit spécial des contrats* (2009) para 6; S Mauclair, *Recherche sur l"articulation entre le droit commun et le droit spécial en droit de la responsabilité civile extracontractuelle* (2012) para 115ff esp 146-185; C Goldie-Genicon, "Droit commun et droit spécial" (2013) 7 RD Assas 29 at 30, 36; Habre (n 72) paras 1003-1008; N Balat, *Essai sur le droit commun* (2016) paras 82-101 esp 84-87.

[95] *Contra*, it seems, claiming that the subsidiarity of the *droit commun* follows from its nature, or as of right ("*de plein droit*") is Balat (n 94) para 92. For the author, this is because *droit commun* is law, which applies mandatorily, so its subsidiarity does not need to be recalled or, it would seem, based on any legislative text.

[96] For agreement that a rule of subsidiarity must have such authority, see Raynard (n 72) at 134; Casson (n 72) at 169; Gouëzel (n 62) para 91; Fucini (n 72) para 121. See also C Pérès-Dourdou, *La règle supplétive* (2004) paras 400-401 and note 334, para 435 and note 518.

[97] Among many other decisions, see Civ 1re, 7 December 2004, pourvoi n° 01-10271, *Bull civ* I, n° 307; [2005] RDC 681, observations by D Mazeaud: contracts; Civ 1re, 11 January 2005, pourvoi n° 02-19016, *Bull civ* I, n° 13; [2005] RTD Civ 375, observations by J Hauser: delictual liability; Com, 31 January 2012, pourvoi n° 10-24731, *Bull civ* IV, n° 23; [2012] D 493, observations by X Delpech: prescription.

[98] For its qualification as a rule of subsidiarity, see, eg, N Balat, "Réforme du droit des contrats: et les conflits entre droit commun et droit spécial?" [2015] D 699 paras 1-2.

[99] On which, see N Blanc, "Contrats nommés et innomés, un article disparu?" [2015] RDC 810; J Huet and A Ghozi, "L"article 1105 nouveau du Code civil: modification suggérée" [2017] RDC 168.

[100] See, eg, Evans-Jones (n 9) paras 3.09-3.10, 3.37-3.39, 7.03-7.25.

[101] Grantham and Rickett, "Subsidiarity" (n 28) at 291-293; Grantham and Rickett, "Property Rights" (n 27) at 741-744. See also R Grantham and C Rickett, *Enrichment and Restitution in New Zealand* (2000) 51-53. The Scottish cases seem also to see subsidiarity as part of the law of unjustified enrichment: *Transco* (n 13) paras 12-13; not questioned in *Courtney"s Executors* (n 15) para 52.

[102] A O"Brien, "The Relationship between the Laws of Unjust Enrichment and Contract: Unpacking *Lumbers v Cook*" (2011) 32 Adel LR 83 at 89-100. This seems also to be the view of G Virgo, *The Principles of the Law of Restitution*, 3rd edn (2015) 133-134.

H. FIFTH PROPOSITION: NOT SOVEREIGNTY

For a relationship of subsidiarity to exist, no entity said to be part of that relationship can be sovereign over any other entity in that relationship. In such a situation, there would be nothing for subsidiarity to do, because authority in that context would be allocated *unconditionally*. This goes against the essence of subsidiarity. As outlined at the start of section C of this paper, subsidiarity is a *conditional* idea. If understood as absolute, sovereignty is antithetical to subsidiarity.[103] If, for example, a doctrine of constitutional law renders federal undertakings immune from the legislative acts of provincial powers, then on the facts, the sovereign federation and subordinate provinces are not in a relationship of subsidiarity.[104]

The Catholic Church teaches that the violation of the principle of subsidiarity is a "disturbance of right order".[105] Subsidiarity has been called a "most weighty principle, which cannot be set aside or changed, [and] remains fixed and unshaken in social philosophy", pronounced under the Church's "supreme authority upon social and economic matters".[106] Taking Catholic teaching on its own terms, there is no room for the sovereignty of any entity to which subsidiarity applies, from the multinational corporation to the private individual.

So, too, in European Union law. The letter of article 5(3) TEU and the relevant case law are explicit. Subsidiarity only applies in areas outwith the "exclusive competence" of the Union,[107] ie, when it is *not* sovereign over the Member States. A subsidiarity principle to regulate competences which the Union can either exercise or delegate to the Member States would be pointless.[108] And the binding nature of the subsidiarity principle, demonstrated in the immediately preceding section of this paper, would be irreconcilable with the Union's exclusive competence (ie, its capacity to decide whether to act).

Moreover, in European Human Rights law, it seems that neither the contracting states nor the ECtHR are exclusively competent to secure the protection of convention rights. From the sources discussed in section C(3), this appears to be one of the bases upon which the Convention itself sits.

The French writers on subsidiarity in private law appear not to have addressed this point. But in other areas, many scholars believe that it is correct.[109] So, it has been said that "subsidiarity is an

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[103] It is not, of course, argued that *state* sovereignty works in absolute terms. It does not: N MacCormick, "On Sovereignty and Post-Sovereignty" in idem, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (1999). And it might never have done so: L Bretherton, "Sovereignty" in N Adams, G Pattison and G Ward (eds), *The Oxford Handbook of Theology and Modern European Thought* (2013).

[104] *Canadian Western Bank v Alberta (Province)* [2007] SCC 22, [2007] 2 SCR 3 para 45: "[t]he asymmetrical effect of interjurisdictional immunity can also be seen as undermining the principles of subsidiarity".

[105] Pius XI (n 74) para 80.

[106] ibid, paras 41, 79.

[107] *British American Tobacco* (n 46) para 179; Case T-420/05 *Vischim v Commission* EU:T:2009:391, [2009] ECR II-3841 para 223.

[108] TFEU art 2(1): "When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts."

[109] P D Marquardt, "Subsidiary and Sovereignty in the European Union" (1994) 18 Fordham Intl LJ 616 at 635; N MacCormick, "Democracy and Subsidiarity in the European Commonwealth" in idem, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (1999) 137 at 142; P Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law" (2003) 97 Am J Intnl Law 38 at 58, 62-63, 66; I Roele, "Sidelining Subsidiarity: United Nations Security Council "Legislation" and Its Infra-Law" (2016) 79(2) Law & Contemp Probs 189 at 190-199; P Carozza, "The Problematic Applicability of Subsidiarity to International Law and Institutions" (2016) 61 Am J Juris 51 at 60-63 esp 62.

alternative to sovereignty";[110] and that "[a]s pure concepts, sovereignty and subsidiarity are irreconcilable".[111] Since this "not sovereignty" point is essentially the obverse of the "subsidiarity as meta-authority" point, the food for thought for private lawyers, mentioned under the previous heading, need not be repeated here.

I. SIXTH PROPOSITION: NOT CONCURRENCE

An extant relationship of subsidiarity is incompatible with the free concurrence of the entities said to be part of that relationship. Conditionality would be absent in such a situation, since the competence of any entities would not be ordered in any way at all. The whole point of subsidiarity is to prevent concurrence which is happening, or might happen. It is unsurprising to find this borne out in each context under consideration.

As we have seen, Roman Catholic subsidiarity is premised on there being an ideal, or best, level of society at which a given function may be discharged.[112] Article 5(3) TEU is clearly framed on the assumption that the overlaps in initiatives by the European Union and Member States, which would ensue in subsidiarity's absence, need to be regulated. The articulation of articles 13 and 35(1) ECHR is perhaps the clearest example on the point. The order in which contracting states and the ECtHR may hear alleged Convention violations is explicitly regulated by those provisions, as interpreted by the ECtHR. But it should be remembered that this is only the default position. It seems not antithetical to subsidiarity for there to be overlap – perhaps in the form of co-operation – in the exercise of competence by entities, *once it has been decided that a subsidiary entity is allowed to act*. Support for this derives from one of the definitions of the Latin *subsidium*, a "body of troops with held [*sic*] from action as a reinforcement for the front line or [similarly], the reserves".[113] It is reasonable to suppose that it would have been thought better for an officer – let us assume a general[114] – with overall command of front line troops and reservists to deploy the latter before the former are all dead.

Many scholars, including French private lawyers writing on subsidiarity, are explicit about the point made in this section.[115] Other scholars also assume its correctness.[116] Anglophone private lawyers may be reassured that unjust enrichment discourse already accepts the idea, too. So, the subsidiarity of unjust enrichment has been put forward because "unjust enrichment threatens to create all types

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[110] Cahill, "Attraction to Subsidiarity" (n 64) at 123.

[111] Cahill, "Theorizing Subsidiarity" (n 37) at 216.

[112] See also *Compendium of the Social Doctrine of the Church* (n 44) §§185-188.

[113] P G W Glare (ed), *The Oxford Latin Dictionary*, 2nd edn (2012) 2038-2039. See also DP Simpson, *Cassell's Latin Dictionary*, 5th edn ([1968] repr 1984) 578.

[114] See A K Goldsworthy, *The Roman Army at War: 100 BC – AD 200* (1996) 161; J Thorne, "Battle, Tactics, and the Emergence of the Limites in the West" in P Erdkamp (ed), *A Companion to the Roman Army* (2007) 218 at 224; P Rance, "Battle" in P Sabin, H van Wees and M Whitby (eds), *The Cambridge History of Greek and Roman Warfare, II: Rome from the Late Republic to the Late Empire* (2007) 364-365.

[115] Raynard (n 72) at 134; Casson (n 72) at 152; Gouëzel (n 62) paras 46-47; Habre (n 72) para 20; Fucini (n 72) paras 119, 121-122.

[116] D Z Cass, "The Word That Saves Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community" (1992) 29 CMLR 1107 at 1128-1134; K Duncan, "Subsidiary and Religious Establishments in the United States Constitution" (2007) 52 Vill LR 67 at 72-74; J Finnis, *Natural Law and Natural Rights*, 2nd edn (2011) 145-147; A von Staden, "The Democratic Legitimacy of Judicial Review beyond the State: Normative Subsidiarity and Judicial Standards of Review" (2012) 10 Int J Const L 1023 at 1034-1038, 1048-1049; L D Weinberger, "The Relationship Between Sphere Sovereignty and Subsidiarity" in M Evans and A Zimmermann (eds), *Global Perspectives on Subsidiarity* (2014) 49 at 59-60; S G Calabresi and L D Bickford, "Federalism and Subsidiarity: Perspectives from US Constitutional Law" (2014) 55 Nomos 123 at 148-158. Some political scientists have made the point explicitly, too. See, eg, D Golemboski, "Federalism and the Catholic Principle of Subsidiarity" (2015) 45 Publius 526, 538, 540-541: subsidiarity and federalism both "prescribe cooperation, not competition between state-level and national-level entities. […] [T]hey both reject an assumption of competition between state and national authorities".

of overlaps with, and even takeovers of, areas which belong to other core doctrines of the private common law";[117] or that it can be understood as requiring that unjust enrichment "yield to the positive dispositions and also to the negative implications of […] other legal institutions".[118] In the private law context, then, the proposition under discussion means, for example, that if two claims can be invoked in any order and for any reason, they are not in a relationship of subsidiarity.

J. CONCLUSIONS

Anglophone private lawyers are yet to reflect seriously on the usefulness – or use*less*ness – of subsidiarity to explain, outwith the unjust enrichment context, relations between different kinds of claim or legal institution. This paper examines conceptions of subsidiarity in spheres other than private law. It also links six propositions derived therefrom to relevant literature, including French literature about subsidiarity in private law in general, and to what abstract thinking can be distilled from unjust enrichment discourse. Though they are not all stated clearly, some awareness of the propositions put forward is evident in that discourse. But its thinness relative to developments elsewhere, and a lack of consensus on the very source of unjust enrichment's subsidiarity (discussed in section G, *in fine*), suggest that private lawyers' understanding of subsidiarity in the abstract is germinal. Further debate is needed in order effectively to assess the potential for subsidiarity to assist in understanding the interrelation of different institutions of private law. It is hoped that the six propositions suggested in this paper will serve as a conceptual starting point in this regard. With them in mind, this paper closes with some reflections on the potential of subsidiarity in private law.

It is suggested in section D that *an operative rule or principle of subsidiarity is not concerned to determine whether a given entity to which it applies actually exists*. Subsidiarity therefore represents a relatively benign way to model the interrelation of private law claims, doctrines, and institutions. Subsidiarity's apparent independence from those claims, etc (discussed in section G), also means that it should not affect their substantive content. Nor does the mere use of a subsidiarity analysis dictate the precise condition on which a subsidiary entity will be allowed to function: we saw above, for example, the differing conditions on which the EU or the ECtHR can act in place of Member States or domestic courts (effectiveness and absence of domestic recourse, respectively). Similarly, then, the condition on which a subsidiary *private law* claim or doctrine can operate may also be framed according to considerations relevant to the precise context in which a given subsidiarity rule is applied. These considerations include the content of the regimes it acts upon.[119] It thus appears that the principal potential contribution of subsidiarity to private law analysis is *clarity* about how claims and doctrines relate to each other.

In section E, it is proposed that *a relationship of subsidiarity positively requires the existence of at least two entities, or groups of entities*. It may be noted that subsidiarity can provide clarity about the relationship between multiple private law claims doctrines, not just pairs of them. As discussion about subsidiarity by private lawyers becomes more sophisticated, more complex subsidiarity analyses may meet with approval.

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[117] Grantham and Rickett, "Subsidiarity" (n 28) at 299. See also Havelock, "Taxonomic Approach" (n 27) at 475-476.
[118] Smith (n 30) at 613. See also MacQueen (n 31) at 350-351.
[119] In a different context, Burbidge (n 82) argues that the social groups whose decision making authority is governed by a subsidiarity principle should be able to contribute to the framing of that principle. In private law analysis, this might equate to framing the condition on which subsidiary and non-subsidiary doctrines operate by reference to their content, or remedial effects.

Where more than one claim or doctrine is potentially relevant on a given set of facts,[120] then, as suggested in section F (addressing overlap), subsidiarity might be relevant if private lawyers wish to prevent or systematise the invocation of those claims or doctrines by litigants. As seen in section G (addressing meta-authority), subsidiarity can facilitate this via an authoritative, conditional ordering among claims or doctrines. Two results of "subsidiarity as meta-authority" are the propositions addressed in sections H and I. Private law claims or doctrines in a relationship of subsidiarity cannot themselves dictate the application of others in that relationship, or simply apply at random (not sovereignty and not concurrence).

These abstract observations seem unobjectionable in principle. However, brief further reflection discloses two (non-exhaustive) potential complications with the use of subsidiarity to understand private law. Both concern what subsidiarity would require of private law in order to function within it.

From this perspective, among the elements of subsidiarity outlined in this paper, meta-authority is the most problematic. For subsidiarity to model the interaction of legal rules and doctrines in practice, it would be necessary prospectively to recognise the possibility of, and then progressively develop, many organising meta-rules, capable of mediating relations between rules and doctrines. Elsewhere, there are perhaps too many levels of norms to contend with.[121] But in the private law context, to expect the recognition of even *one* level of organising rules – specially made to sit above existing institutions (like contracts and torts) or doctrines, and so on, and control their interaction – may be unrealistic. It is hard to conceive of strong general support;[122] and the judges would likely be unwilling to make any such moves.[123]

A second difficulty is that insufficient certainty beneath the surface of private law doctrine may hinder subsidiarity's operation. In and around declared legal rules and their formal sources (such as common law and statute) lie normative commitments, consciously made or not; debated or not. It is suggested that such underpinnings may need to be spelt out in some detail, and with a degree of consistency, for subsidiarity reliably to assist in understanding the interrelation of different claims, rules, or doctrines. Lawyers would need to refer to them to decide what should be subsidiary, and *to* what, and perhaps to frame the condition on which a given regime, or type of regime, should operate instead of another. Leaving aside the obvious potential for debate about what the law says, or should say, and why,[124] the rationale of legislation concerning private law concepts is sometimes unclear;[125] and whilst the judiciary may pronounce on the functions and

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[120] As where a fraudulently induced mistaken payment could constitute an unjust enrichment or the tort of deceit in English law (the tentative suggestion in *Alvarez v Moor* [2019] EWHC 1774 (QB) para 113 that "a restitution claim founded on a mistake of fact [is not] an appropriate cause of action or remedy where the mistake is deliberately induced by the defendant" is incorrect). For this conception of overlap, Casson (n 72) at 151, was cited above. But what overlap means in the context of subsidiarity in private law may become more sophisticated in time.

[121] Jachtenfuchs and Krisch (n 67) at 20.

[122] Thinking of doubts about professional, parliamentary, and public support for codification, an endeavour involving, like the introduction of subsidiarity to private law, answers to many systemic questions: M Hogg, "Codification of Private Law: Scots Law at the Crossroads of Common and Civil Law" in K Barker and R Grantham (eds), *Private Law in the 21st Century* (2017) at 119-120, 123-124.

[123] Based on their reluctance to undertake arguably less radical legal landscaping. See, eg, *Tillman v Egon Zehnder Ltd* [2019] UKSC 32, [2019] 3 WLR 245 para 85, where the court observed: "Were it ever to be thought appropriate to confer on the court a power to rewrite a [covenant in restraint of trade] so as to make it reasonable, it would surely have to be achieved by legislation […]."

[124] Take ongoing controversies about the existence and form of unjust enrichment. See, eg, N Jansen, "Farewell to Unjustified Enrichment?" (2016) 20 Edin LR 123; R Stevens, "The Unjust Enrichment Disaster" (2018) 134 LQR 574; L Smith, "Restitution: A New Start?" in P Devonshire and R Havelock (eds), *The Impact of Equity and Restitution in Commerce* (2018).

[125] See, eg, the work required in *W Nagel (A Firm) v Pluczenik Diamond Company NV* [2018] EWCA Civ 2640, [2019] 2 All ER 194 paras 68, 79-85.

reasons of private law, there is seldom much depth or uniformity in relevant observations.[126] The judges cannot, of course,[127] be criticised for this.[128] They may pursue coherence,[129] and consider the policies behind legal rules.[130] But they still normally decide only the disputes before them.[131] They cannot be great systematisers or justifiers: most often, they develop their law incrementally.[132] Without more clarity from authoritative sources on the law's foundations, though, subsidiarity might only assist with basic instances of interaction. Even then, it might not improve on usual methods of understanding legal interrelation. These can often adequately resolve overlaps,[133] if, indeed, they are considered problematic in the first place.[134]

This paper has considered one concept which could be employed to improve our understanding how different parts of private law relate to each other. In principle, subsidiarity could be useful in this endeavour, and neither difficulty just identified militates unanswerably against its use in legal *scholarship*. However, to the question whether subsidiarity might actually find acceptance in private *law*, the response may be: perhaps not.

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[126] Take the brief and differing views on contract and tort law expressed in *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20, [2019] AC 649 para 31; *Robinson v PE Jones (Contractors) Ltd* [2011] EWCA Civ 9, [2012] QB 44 para 79. For a Scots example, it has been doubted whether, in the cases, "much time is spent in analysing the components" of ostensible authority in agency: *Gregor Homes Ltd v Emlick* 2012 SLT (Sh Ct) 5 para 40.

[127] K Reid, "Smoothing the Rugged Parts of the Passage: Scots Law and Its Edinburgh Chair" (2014) 18 Edin LR 315 at 337-338.

[128] It may not even be wise for them to go much further for many reasons. For example, it has been argued that judge-made law balances consistency and change by being composed of relatively stable formal doctrine, capable of accommodating varied and evolving normative concerns beneath it: S Balganesh and G Parchomovsky, "Structure and Value in the Common Law" (2015) 163 U Pa LR 1241.

[129] For recent further discussion of which, see, eg, A Fell, "The Concept of Coherence in Australian Private Law" (2018) 41 Melbourne ULR 1160.

[130] For both of these, see *Patel v Mirza* [2016] UKSC 42, [2017] AC 467 esp paras 99, 101, 231-232. But notes of caution are often sounded about policy, as in *Glencore International AG v Commissioner of Taxation* [2019] HCA 26 paras 40-41: "The [common] law develops by applying settled principles to new circumstances, by reasoning from settled principles to new conclusions, or determining that a category is not closed. Even then the law as developed must cohere with the body of law to which it relates. Policy considerations may influence the development of the law but only where that development is available having regard to the state of settled principles. Policy considerations cannot justify an abrupt change which abrogates principle in favour of a result seen to be desirable in a particular case."

[131] *Tate & Lyle Technology Ltd v Roquette Frères* [2010] EWCA Civ 1049, [2011] FSR 3 para 44: "We have to decide the case before us on its own terms, on the basis of the material and the arguments presented to the judge below and to us." See also, eg, *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24, [2019] AC 119 paras 18, 20.

[132] Described as "the orthodox route" towards more general principles in *Prince Alfred College Incorporated v ADC* [2016] HCA 37, (2016) 258 CLR 134 para 46. See also *Woodland v Swimming Teachers Association* [2013] UKSC 66, [2014] AC 537 para 28: to avoid becoming "unprincipled", the common law must develop "incrementally by analogy with existing categories, and consistently with some underlying principle […]"; A Rodger, "Thinking about Scots Law" (1996) 1 Edin LR 3 at 11: "Scots law has long been built by the working-out of doctrine in our case-law and […] this is what gives strength to any statements of principle which may from time to time emerge". For judicial support for incrementalism in a mixed legal system, see *Member of the executive Council for Health and Social Development of the Gauteng Provincial Government v Zulu obo Zulu* [2016] ZASCA 185 para 12. (On the need to acknowledge the practical realities of common law development in South Africa, even when considering constitutional imperatives, see *Septoo v Road Accident Fund* [2017] ZASCA 164 paras 15-21 esp 16-17.)

[133] As where statutory interpretation and the policy of upholding the insolvency legislation clarified the latter"s potential overlap with aspects of unjust enrichment at common law in *Skandinaviska Enskilda Banken AB (Publ) v Conway* [2019] UKPC 36 esp paras 94-111.

[134] Which, of course, they may not be. For discussion, see, eg, *Fistar v Riverwood Legion and Community Club Ltd* [2016] NSWCA 81, (2016) 91 NSWLR 732 paras 46-51.